UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SWEDISH MEDICAL CENTER

Employer

and Case 19-RC-15245

SEIU HEALTHCARE DISTRICT 1199NW

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("the Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("the Board").[1] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I make the following findings and conclusions.[2]

I. SUMMARY

Swedish Medical Center ("the Employer") operates a system of health care institutions in the State of Washington. SEIU Healthcare District 1199NW ("the Petitioner"), a labor organization within the meaning of Section 2(5) of the Act, currently represents a unit of the Employer's technical employees.[3]

The Petitioner seeks, by this petition, a self-determination election for all full-time and regular part-time dosimetrists and radiation therapists to decide whether they wish to be included in the existing technical unit. The Employer opposes the petition, asserting that the dosimetrists and radiation therapists are professionals under Section 2(12) of the Act.

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[1] The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

[2] The Employer and Petitioner submitted timely briefs, which I have carefully considered.

[3] No other labor organization seeks to represent the employees covered by the instant petition.

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. As set forth below, I find that the Employer's dosimetrists and radiation therapists are "technical employees," not professionals under Section 2(12) of the Act.

Below, I have set forth the record evidence relating to the Employer's operations. Following my summary of the relevant record evidence is my analysis of the applicable legal standards, and their application to the facts of this case. Given my conclusion that there is no basis to dismiss the petition, the final section sets forth the direction of election and the process for requesting review of this decision.

II. RECORD EVIDENCE

A. The Employer

The Employer, a State of Washington corporation, operates a system of health care institutions in the greater Seattle, Washington area. The Employer's operations include three hospital campuses and various out-patient clinics.[4] Out of its main hospital campus, First Hill, the Employer operates the Swedish Cancer Institute. Dr. Albert Einstein, Jr. serves as the Senior Medical Director for the First Hill campus and as the Executive Director of the Swedish Cancer Institute (hereafter, "the Cancer Institute"). Dr. Einstein testified that the Cancer Institute is the largest cancer program in the State of Washington, seeing more than 4,500 new cancer patients a year. The Cancer Institute provides a comprehensive array of cancer services, including prevention, screening, diagnosis, treatment, survivorship, and hospice care.

The Cancer Institute operates six radiation therapy clinics in the greater Seattle area. The main radiation therapy clinic is located at First Hill. Radiation therapy services are also provided at Cherry Hill, Stevens Hospital, Northwest Hospital, Highline Hospital, and Valley Medical Center.

B. Radiation Therapy

Dr. Einstein described radiation therapy as using high energy radiation beams to destroy cancer cells. The goal of this treatment, according to Dr. Einstein, is to deliver as high a dose of radiation as possible (maximizing cancer cell deaths), while sparing normal tissue to the highest degree possible. Radiation therapy is dangerous; an overdose may disable or kill the patient; an underdose will not adequately treat the cancer.

[4] The parties stipulated that the Employer is a health care institution within the meaning of Section 2(14) of the Act. The Board has previously found that the Employer's First Hill hospital is an acute care hospital. *Swedish Medical Center*, 325 NLRB 683 (1998).

The standard machine used for radiation therapy is a linear accelerator, which delivers a high energy radiation beam to the cancer. The Cancer Institute also treats cancer with a cyber-knife – a linear accelerator attached to a robotic arm, which delivers a higher energy beam from multiple locations during a single treatment – and brachytherapy – a form of radiotherapy where the cancer is treated from the inside. Each of these forms of treatment depends on sophisticated computer technology. Treatment is normally delivered on an out-patient basis; patients that require admission, either for complications of their treatment or complications of their disease, are admitted primarily to the First Hill campus, where there are two in-patient units that are dedicated to the management of patients with cancer.

The following classifications of employees are involved in the delivery of radiation therapy: radiation oncologists, medical physicists, radiation nurses, dosimetrists, radiation therapists, and receptionists.

C. Dosimetrists

1. Dosimetrists' Duties and Responsibilities

Dr. Einstein explained that the patient initially sees the radiation oncologist, who assesses the clinical situation to confirm the diagnosis, establishes the treatment objectives, and prescribes the dosage of the treatment and the cancerous region to be treated (the target). The dosimetrist, working with the physicist, designs the treatment plan that will deliver the radiation dose prescribed by the radiation oncologist.[5]

After the radiation oncologist determines that radiation treatment is appropriate, the patient will typically be "simulated" by a radiation therapist. The simulation consists of a CT scan and, possibly, an MRI or PET scan.[6] The purpose of the simulation is to obtain a digital image of the area to be treated. Dosimetrists, who typically have a radiation therapy background, may be consulted during this process to help guide patient set-up or positioning. The information obtained in this simulation is sent to dosimetry and used for planning.

In the event there are multiple scans, the dosimetrist must fuse the scans together until they are aligned. There is an automatic feature that fuses scans

[5] The job description for a Dosimetrist I, the entry-level dosimetrist classification, summarizes the position as follows: "This position is concerned with the design, development, measurement, calculation, calibration, and implementation of the isodose distributions for patients undergoing radiation therapy as prescribed by the Radiation Oncologist under the direction of the Medical Physicist. This person is a member of the dosimetry team and is thoroughly familiar with the physical and geometric characteristics of the treatment planning application, record and verify application, linear accelerator, simulator, CT scanner, HDR unit, and radioactive sources most commonly used for brachytherapy treatment."

[6] In some cases a lesion will not show up on a CT scan, requiring the physician to order an MRI or PET scan.

together, but sometimes this must be done manually. The process of fusing images together can be complicated because the patient may not lay the same way on each machine.

Using a computer mouse, the dosimetrist contours (draws) the structures in the target area that must be avoided. This task requires knowledge of anatomy. There can be 200 slices in a CT study; the dosimetrist contours each slice, creating a 3-D rendering. Typically, contouring takes 1-1½ hours, though it may take half a day depending on the complexity of the case. Dosimetrist Scott Honeywell testified that he spends one-third to one-half of his 8-hour workday contouring. Honeywell further testified that this task does "not really" involve making or exercising choices or judgments because the dosimetrist can typically see what he or she is drawing and is "just tracing" a lot of the time. The dosimetrist will call the physician if he or she cannot delineate a structure.

After the contouring is complete, the physician selects the target, the dose, and the goals for the surrounding structures (e.g., "I want this [target] to get 'x' dose, but I don't want you to treat the spinal cord."). The physician also determines the margin (or ring) to be built around the target to account for movement of an organ or tumor. The dosimetrist may participate in the targeting decision, but the ultimate responsibility for defining the target rests with the physician. Using treatment planning software, the dosimetrist then develops a patient-specific treatment plan. As explained by Honeywell, the dosimetrist's job is "to then decide how to deliver that dose to that structure, while avoiding the normal tissue."

In using the treatment planning software to develop the treatment plan, the dosimetrist considers a number of factors ("parameters"), including: the number of radiation beams that should be used; whether the beams should be static or rotating; the amount of radiation that should come from each beam; the angle that the beam should come from; and the shape of the beam. There are guidelines of doses that certain tissues can get and angles of beams, but each patient is different, requiring individual planning. In the software, the dosimetrist manipulates each of the parameters to produce the optimum plan. David Shepard, Ph.D. (Physics), is the Employer's Director of Medical Physics. In that capacity, Shepard oversees the Employer's medical physicists and dosimetrists. Shepard testified that there are hundreds, if not thousands (sometimes tens of thousands), of parameters to be considered when developing the best treatment plan. Shepard continued that, as a result, there is "a lot of manipulation in going through the process to try to determine the best possible treatment plan for each individual patient." According to Honeywell, however, the computer and the algorithms within the treatment planning software do "a lot of that" (considering the parameters to determine the best treatment plan), with the dosimetrist making "little adjustments in the computer." Further, Honeywell testified that although the treatment planning software includes different algorithms that

predict the radiation dosage for a particular case, a standard algorithm is used for the vast majority of cases to predict the radiation dose.[7]

Honeywell testified that dosimetrists "have a lot of discretion on picking angles, table angles, and just how many beams you might use for one treatment." He further described this as a "highly subjective" process. As an example, Honeywell testified that a dosimetrist might create a plan with a low energy radiation, a plan with a high energy radiation, and a plan with "in-between radiation." The treatment planning software determines what dosage each structure absorbed and what would be the effect of that dosage on all of the structures. The dosimetrist then analyzes the plans to determine which one best covers the target, while sparing the normal tissue.

In reference to an example of a treatment plan, Shepard described the treatment planning process as follows:

> [T]here are a lot of parameters associated … with each plan.… "How many beams am I going to use?" You know, is it going to be static beams, rotating beams, how much radiation from each beam, how do I weight those beams, how do I shape the beams.… [T]here are these modifiers which are basically saying how am I shaping the beam. There is a selection of which dose calculation tools you are going to use and then we do verify the accuracy of those for each individual patient, how we do tests to verify that we are accurately predicting how the radiation dose predictions, so that we don't, you know, over-dose or under-dose a patient.… These are the different volumes, and what the minimum and maximum dose is, what is the mean dose, and so we look at all of these different parameters and try to gauge the plan quality and then if you get to where it starts getting into sort of the pictures, you look at these things called dose histograms and isodose plots, and the basic thing is they need to be able to look at all of this information and then try to make the judgment call, "Is this plan better or worse than another plan I am comparing it against," and what is the quality of it.

The treatment planning software does not identify the best plan, but there are analytical tools within the software that compare the effect of the different plans, enabling the dosimetrist to make that decision. There are standard, industry-wide tolerances that the dosimetrists follow (e.g., if the spinal cord receives a certain dosage it will cause paralysis). The dosimetrist analyzes the plans in light of the standards, as well as patient comfort (e.g., can the patient hold a certain position for the duration of the treatment), and determines which one best covers the target, sparing the normal tissue. If a plan does not meet the criteria, the dosimetrist will change something (e.g., move a beam, which takes "maybe thirty seconds") and then analyze the plan again. After reviewing the

[7] In some cases, the dosimetrist must select the appropriate algorithm.

plan(s) for errors, the dosimetrist presents the best plan or a series of options to the physician, who makes the final decision. The physician may accept the dosimetrist's treatment plan or ask for another option.[8] Sometimes, multiple iterations of a plan will be prepared before a plan is presented to the physician. Shepard testified that there is "a certain amount of standardization that can take place" in determining how best to treat a patient, but the process will always be specific to the patient and the physician.

In a typical day, a dosimetrist works on 3-6 treatment plans. Honeywell testified that developing a treatment plan may take half an hour or all day. Typically, Honeywell spends half of his work day developing treatment plans. Some of that time is spent making choices between, for instance, the angle of the beam and how many beams should be used to deliver the prescribed dose to the target area; part of that time is also spent transferring the plans and chasing down doctors.

Physicists are available to answer a dosimetrist's questions about the treatment planning system. Typically, dosimetrists do not conduct research themselves; rather, the dosimetrist will voice questions or concerns to the physicist, who will then research the issue and provide a response. Honeywell testified that in response to a question from a dosimetrist, the physicist "will look at it and they will decide and they will make a final call."

After the physician signs off on the plan, the plan is sent to the treatment machine. Before treatment, the plan is reviewed by a second dosimetrist for errors and to ensure it was properly entered into the system. Shepard testified that a physicist also does a check on every plan. Dosimetrists are not generally engaged on a day-to-day basis in the delivery of the treatment, but the radiation therapist may consult the dosimetrist if there are any questions concerning treatment.[9] The dosimetrist may also become involved if there are changes over the course of treatment. The physician must sign off on the plan, in writing, before the third radiation treatment. But the physician must approve the plan, at least verbally, before any treatments are administered.[10]

2. Dosimetrists' Knowledge and Education

Shepard testified that dosimetrists must have a working knowledge of radiation physics (e.g., radioactivity, production of x-rays, interaction of radiation

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[8] Some physicians sit down with the dosimetrist to work on a treatment plan; other physicians will select from plans developed by the dosimetrist. Either way, the physician makes the final call and signs-off on the plan.

[9] Honeywell testified that the radiation therapists typically do not consult with the dosimetrist during treatment, but when that occurs he decides whether to consult the doctor.

[10] In brachytherapy, defined above, the dosimetrist designs the treatment plan and delivers the dose. This is done in the presence of the physician, the physicist, and the nurse, in order "to make sure everything is going according to plan." It is not clear how often dosimetrists perform brachytherapy.

with matter), radiation biology, anatomy, and physiology; dosimetrists must also learn all the approaches to treatment, including treatment planning, localization, and brachytherapy. In addition, they need to understand radiation protection, radiation safety, and quality assurance. Dosimetrists must also be able to run advanced software, including the different types of treatment planning software.[11] As Shepard testified, technological advances in the systems used by dosimetrists require "technical savvy."

Dosimetrists are not required to hold a bachelor's degree. As set forth in the job description, the educational requirement for the dosimetrist position is as follows:

> **Education:**
> 1) An A.R.R.T.[12] registered Radiation Therapist (must have Washington State Certification) and graduate at an AAMD approved university or hospital based training program with a clinical and classroom curriculum of a minimum of one year. Must be a Certified Medical Dosimetrist (CMD) or CMD eligible. If CMD eligible, must obtain CMD within 2 years.
> Or
> 2) An A.R.R.T. registered Radiation Therapist (must have Washington State Certification) with documented completion of a full-time two year on-the-job training program under the direction of a CMD Medical Dosimetrist, Medical Physicist, and a Radiation Oncologist. Must be a Certified Medical Dosimetrist (CMD) or CMD eligible. If CMD eligible, must obtain CMD within 2 years.
> Or
> 3) Has a B.S. in a physical science and is a graduate of an AAMD approved university or hospital based training program with a clinical and classroom curriculum of a minimum of one year. Must be a Certified Medical Dosimetrist (CMD).
> Or
> 4) Has a B.S. in a physical science with documented completion of a full-time two year on-the-job training program under the direction of a CMD Medical Dosimetrist, Medical Physicist, and a Radiation Oncologist. Must be a Certified Medical Dosimetrist. (CMD).

Thus, as the Employer states in its post-hearing brief, the Employer "requires that dosimetrists be certified by the Board of Certified Medical Dosimetrists or be CMD eligible and be either an A.R.R.T. registered radiation therapist, or have graduated with a bachelor of science program from an AAMD

[11] The job description for a Dosimetrist I lists the following under "Experience and Skills": Windows Operating System. IMPAC Record and Verify + Viewstation, CMS Focus Treatment Planning System, and Nucletron HDR Planning System, GE CT scanner, Varian EX Series Linear Accelerators, and NOMOS IMRT TPS Preferred.
[12] The American Registry of Radiologic Technologists.

approved university or hospital training program and have one to two years of on the job training."

The record indicates that, due to technological improvements, the requirements for entrance into dosimetry are becoming more rigorous. At present, though, there is no bachelor's degree requirement. In the absence of a bachelor's degree in a physical science, a dosimetrist must be certified as an A.R.R.T.-registered radiation therapist. As set forth more fully below, an A.R.R.T.-registered radiation therapist typically completes a 2-year community college program and passes an examination. One avenue for an individual to become CMD eligible is to obtain an active registration with A.R.R.T. in radiation therapy, complete 24 months of clinical dosimetry, and complete 12 approved continuing education credits during the 24 months of clinical experience.[13]

The majority of the dosimetrists employed by the Employer entered the field by becoming an A.R.R.T.-registered radiation therapist. Five of the eleven dosimetrists employed by the Employer do not have a bachelor's degree in any field. Two of the dosimetrists with a bachelor's degree hold degrees in fields that are not "in a physical science" (Management and Business Administration).[14] Thus, only 4 of the Employer's 11 dosimetrists hold Bachelor's degrees in a field related to dosimetry.[15]

D. Radiation Therapists

1. Radiation Therapists' Duties and Responsibilities

As previously stated, radiation therapists perform the "simulation" on which the dosimetrists create the treatment plan. In a CT simulation, a radiation therapist positions the patient and then administers a CT scan.[16] The purpose of the simulation is to obtain a digital image of the area to be treated. The information obtained in this simulation is sent to dosimetry and used for planning. The physician may order that an immobilization device be used during the simulation. For instance, if the cancer is in the patient's neck, the physician may order a mask, which is a thermoplastic piece that is heated to a low temperature and then formed over the head and/or shoulders of the patient. The mask keeps the patient in the same position every day of the treatment. If there are problems

[13] The subjects covered in the CMD examination include radiation physics, dose calculation methods, and treatment planning. Once certified, a CMD must complete 50 hours of approved continuing education every 5 years. Dosimetrists must obtain their CMD within 2 years of hire.

[14] Carol Nordling, a Dosimetrist II, holds an AA degree in Radiation Technology and a BA in Management. Paul Weber, a Dosimetrist II, holds an AA degree in Radiation Therapy and a BA in Business Administration.

[15] Dosimetrist II William Logan holds a bachelor's degree in Biology and Computer Science and a M.S. degree in Bio-Physics. No other dosimetrist holds an advanced degree in a physical science.

[16] The CT scanner used by the radiation therapists to complete the simulation is similar to the machine used by CT Technologists – a position in the technical unit.

with the mask, the radiation therapist consults with the physician. If the physician does not decide which immobilization device is to be used, the radiation therapist makes that decision, balancing patient comfort and the need to ensure the patient is in the same position every day. The physician may also include in the prescription an instruction about positioning of the patient. The radiation therapist can not change that position without consulting the physician; if the physician has not given such an instruction, the radiation therapist determines the best position.

In the normal case, after the treatment plan is completed, dosimetry electronically sends the plan to the treatment machine, through a program called MOSAIQ. The dosimetrist then takes the chart to the radiation therapist. The radiation therapist verifies that everything in the plan was correctly entered into MOSAIQ and enters the treatment schedule into the MOSAIQ treatment calendar (if a patient does not appear for treatment, the radiation therapist has to adjust the calendar). The first day the patient comes to the clinic is not a treatment day; rather, that day the radiation therapist conducts a "beam verification," filming each of the radiation fields to make sure that the setup looks correct on the treatment machine. Radiation treatment begins the following day.

A team of two to three radiation therapists is assigned to each linear accelerator. Patients are never treated by only one radiation therapist, unless it is an on-call situation. Each linear accelerator treats 15-45 patients a day. A treatment typically lasts 10-20 minutes. As set forth above, the target, dose, and number of treatments are determined by the radiation oncologist. The radiation therapist cannot change any aspect of the physician's prescription; they must give the treatment just as it was prescribed. The radiation therapist cannot administer any treatment to the patient without a prescription from the physician setting forth the target, the dosage, and the number of treatments.

A typical day begins with the physicist warming up and calibrating the linear accelerators. The radiation therapist takes a reading of the radiation and compares it to the standard; if it is not within the margin of error, the radiation therapist calls the physicist. The radiation therapist also prepares the treatment room for the patient. Once the machine is calibrated within the margin of error and the room is ready, the radiation therapist goes to the waiting room to greet the patient and brings the patient back to the treatment room. At this point, the radiation therapist will ask the patient how he or she is feeling. Radiation therapy generally occurs over a multi-week period and the patient's condition can change. The radiation therapist is the only member of the radiation oncology team who sees the patient on a daily basis. As a result, they must assess whether the patient is healthy and able to be treated that day. Jeffrey Lewis, the supervisor of the radiation therapists, characterized the radiation therapists' assessment of the patient as a "layman's assessment," not a "nursing assessment." If the patient reports a problem, the radiation therapist will ask if the patient wants to go ahead with treatment or talk to a nurse or the physician.

The radiation therapist may also consult a nurse or physician if there are physical signs that the patient's condition has changed (e.g., change in skin color).

In the usual case, treatment proceeds as scheduled. In such cases, the radiation therapist brings the patient to the treatment room and sets the patient up for treatment. Set-up involves positioning the patient in accordance with the treatment plan, as determined by the physician. For instance, if the patient is having breast radiation, there are unique devices (breast boards) used to make sure the patient is positioned in the most appropriate way.

The next step is to follow the set-up instructions for the treatment. These instructions are determined by a combination of the instructions in the treatment plan and the CT Simulation. The set-up instructions may be changed by the physician. The radiation therapist will also perform any additional work ordered by the physician. For instance, the physician may order a once a week check of the distance from the linear accelerator to the skin (source to skin distance or SSD). The machine itself reads the distance; the radiation therapist reads the measurement on the screen. If the distance is outside the parameter, it must be reported to Dosimetry.

Once the set-up is complete, and any additional work is done, the radiation therapist leaves the room, shuts the door, goes through a safety pause (double-checking it is the correct patient), and then turns on the machine to begin the treatment. At least one therapist and usually both watch the machine as it is operating and watch the patient on a video monitor. Sometimes the therapist must push buttons to move the linear accelerator. Typically, the treatment is repeated five days a week for a period of time (e.g., 2-6 weeks). Throughout this period, the radiation therapist follows the same routine unless the physician changes the treatment plan, which the radiation therapist can recommend. The majority of the time the treatment is completed without any complications. In 10%-20% of patients, the therapist may recommend that the physician change something.

2. Radiation Therapists' Knowledge and Education

Radiation therapy principally requires the use of sophisticated computer equipment, such as linear accelerators. As set forth in the job description, the educational requirement for the radiation therapist position is as follows:

> **Education:**
> Must be a graduate of a radiation therapy technology program, accredited by the Joint Review Committee in Radiologic Technology [(JRCERT)].

The typical radiation therapy program is 24-months. For instance, Bellevue College, a community college, offers a 24-month radiation therapy program

accredited by JRCERT.[17] The Bellevue College program culminates in an Associate of Arts (A.A.) degree.

Radiation therapists must also be registered by A.R.R.T. in Radiation Therapy, which requires taking an examination, and licensed by the State of Washington.[18] An A.R.R.T. certification is sufficient to obtain the required Washington license; no separate examination is required. For the entry-level position, Radiation Therapist I, experience is preferred, but not required.

The Employer currently employs 36 radiation therapists. Thirty-one of the 36 radiation therapists did not hold a bachelor's degree in a field related to radiation therapy at time of hire. Twenty-seven of the radiation therapists do not hold a bachelor's degree in any field.[19]

E. The Bargaining Unit History

The Employer's non-represented workforce includes 750-800 professional employees, including radiation oncologists and medical physicists. Radiation oncologists are board-certified physicians in radiation therapy. The medical physicists, who offer expertise in the appropriate use of radiation for therapeutic purposes, generally hold a Ph.D. in physics.

The Employer's represented workforce is divided into several bargaining units: a service and maintenance unit, a nursing unit (which includes the radiation nurses), an engineering unit, and a technical unit.

The parties stipulated that the Petitioner currently represents the employees in the following bargaining unit ("the technical unit")[20]:

> All full-time and regular part-time technical employees of Swedish Medical Center ("the Employer") at the Employer's facilities in Burien, Edmonds, Renton, and Seattle, Washington, in the following job classifications:
>
> Cardiovascular Technologist, CPAP Therapist, CT Technologist, Diagnostic Sonographer I, Diagnostic Sonographer II, Dialysis Tech, Diet Tech, Echosonographer, Echosonographer II, EEG Tech, EEG Tech

[17] To enter the radiation therapy program at Bellevue College, an individual must complete approximately one year of college credit.

[18] A "new graduate" is eligible for hire without such certification and registration, but must obtain both within 90 days. In recent years, the radiation therapists hired by the Employer have had both an A.A. degree and obtained their certification and registration. A.R.R.T. requires 24 credits of continuing education every two years.

[19] At least one of the radiation therapists with a bachelor's degree obtained that degree after being hired into that position. Two radiation therapists hold B.A. degrees.

[20] Prior to 1999, the collective-bargaining agreement covering this unit characterized it as a "pro-tech" unit. In the 1999-2002 collective-bargaining agreement, as well as in subsequent collective-bargaining agreements, the unit is referred to as a "technical unit."

Trainee, Interventional Radiation Technologist, Licensed Practical Nurse, Licensed Practical Nurse HCAP, Mammogra[phy] Technologist, Mobile Mammogram Technologist CH, MRI Technologist, Neurophysiology Tech I, Neurophysiology Tech II, Nuclear Medicine Technologist, Occupational Therapy Asst Certified, Orthopedic Technologist, Perioperative Support Tech I, Perioperative Support Tech II, PET CT Technologist, Pharmacy Asst, Pharmacy [T]ech, Pharmacy Tech Sys Coordinator, Physical Therapy Assistant, Pulmonary Function [T]ech, Radiation Technologist Registered I, Radiation Technologist II, Respiratory Care Practitioner, Respiratory Care Practitioner Neo TRSPT, Respiratory Care Practitioner Coordinator, Respiratory Care Practitioner Coordinator Neo TRSPT, Sleep Tech II, Sleep Tech Non Registered, Sleep Tech Registered, Sleep Tech Trainee, Surgical Facilitator, X-Ray Tech.

Excluded from the technical unit are all other employees, guards and supervisors as defined in the Act. As far as the record shows, the technical unit, comprised of 700-800 employees, dates to 1991. The Employer has employed dosimetrists and radiation therapists since 1991, but there is no bargaining history for these classifications.

The Petitioner contends that dosimetrists and radiation therapists should be included in the technical unit because they share a community of interest with other employees in the technical unit, the parties have not historically excluded those job classifications, and dosimetrists and radiation therapists do not share a community of interest with employees in other bargaining units at the Employer's facilities. The Employer argues that it would be inappropriate to include dosimetrists and radiation therapists in the technical unit because they are professional employees, not technical employees.

III. LEGAL ANALYSIS

A. Professional and Technical Employee Status

Section 2(12)(a) of the Act defines "professional employee" as follows:

The term "professional employee" means--
(a) any employee engaged in work
  (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;
  (ii) involving the consistent exercise of discretion and judgment in its performance;
  (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;

(iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes . .

The four criteria set forth in subpart (a) are "conjunctive." *Group Health Assn.*, 317 NLRB 238, 240 (1995) ("Section 2(12)(a) of the Act defines professional employees as those who meet four conjunctive criteria[.]"). "[E]mployees must satisfy each of the four requirements set forth in Section 2(12) before they qualify as professional employees within this definition." *Greenhorn & O'Mara, Inc.*, 326 NLRB 514, 517 (1998) (citing *Arizona Public Service Co.*, 310 NLRB 477, 482 (1993)). See also *The Express-News Corp.*, 223 NLRB 627, 630 (1976) (finding the employer's journalists were not professionals due to their failure to meet the requirements of subpart (iv) of Section 2(12)).

In analyzing this issue, I recognize that "Section 2(12) was meant to apply to small and narrow classes of employees." *The Express-News Corp., supra*. Examples of classifications that the Board has found to be professional employees in the health care field include chemists, *Barnert Memorial Hospital Center*, 217 NLRB 775, 783 (1975); pharmacists, *Mt. Airy Psychiatric Center*, 253 NLRB 1003, 1005 (1981); and medical technologists, *Group Health Assn.*, 317 NLRB at 241-242.

On the other hand, "technical employees are those who do not meet the strict requirements of the term 'professional employee' as defined in the Act but whose work is of a technical nature involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses." *Rhode Island Hospital*, 313 NLRB 343, 353 (1993) (some internal quotation marks and citations omitted). "Technical status is frequently evidenced by the fact that the employee is certified, licensed, or registered, although employees may meet the standards of a technical employee without such certification." Id. at 353 (citing *Barnert*, supra at 776). Examples of classifications that the Board has found to be technical employees in the health care field include laboratory technicians, *Mad River Community Hospital*, 219 NLRB 25 (1975), and x-ray technicians, *Barnert Memorial Hospital Center*, supra.

B. Dosimetrists' Status as Professional or Technical Employees

The Employer currently employs 11 dosimetrists. The Employer contends that dosimetrists are "professional employees" under the Act and, therefore,

cannot be included in the technical unit.[21] The Petitioner maintains that dosimetrists are technical employees. The parties do not cite any Board decision addressing whether dosimetrists are professional or technical employees and my research found no such decision.[22]

Based on the statutory requirements, I find that on the record before me the dosimetrists employed by the Employer are not "professional employees" as defined in Section 2(12) of the Act.

Although the Employer contends that it has always treated the dosimetrists and radiation therapists as professionals, the Employer's internal classification is not controlling. However, I am persuaded that dosimetrists meet subparts (ii)-(iii) of Section 2(12)(a). Dosimetrists are highly skilled and important members of the radiation oncology team; their duties are critical to patient care. Their work in utilizing sophisticated technology to prepare a treatment plan that will deliver the radiation dose prescribed by the radiation oncologist involves the consistent exercise of discretion and judgment, and cannot be standardized in relation to a given period of time. Whether dosimetrists satisfy subpart (i), which requires that the work be predominantly intellectual and varied in character, is a close question. One-third to one-half of a dosimetrists' typical workday is spent "contouring," which was described as "just tracing." In its post-hearing brief, the Employer acknowledges that contouring is "more manual in nature."

During the remainder of the day, dosimetrists work on 3-6 treatment plans. During that portion of the day, dosimetrists manipulate parameters, transfer the plans, and chase down doctors. The Employer contends that in manipulating parameters, the dosimetrist "must manipulate potentially thousands of parameters to create the best possible treatment plan for each individual patient." The record shows that there are thousands of parameters (sometimes tens of thousands), but it is not clear that the dosimetrists themselves manipulate

[21] As the Employer is an acute care hospital, the Board's health care unit rules apply. Accordingly, I reject Petitioner's argument that if the employees in question are professionals, a Sonotone election should be conducted. Rather, such process would create a non-conforming unit under the Board's rules and thus, is not appropriate.

[22] Although the issue was not litigated, decisions issued by other regions indicate that dosimetrists and radiation therapists have most often been included in a technical unit and are generally not included in a professional unit. See e.g., *Pikeville United Methodist Hospital*, 9-RC-17607 (January 11, 2002) (radiation therapists included in unit of technical employees, skilled maintenance employees, and nonprofessional employees); *Latrobe Area Hospital, Inc.*, 6-RC-11939 (March 22, 2001) (dosimetrists and radiation therapists included in technical unit); *Miller-Dwan Medical Center*, 18-RC-16413 (February 19, 1999) (dosimetrists and radiation therapy technicians included in technical unit); *Washoe Medical Center*, 32-RC-4631 (July 20, 1999) (radiation therapy tech registered included in technical unit). But see *Bluefield Regional Medical Center*, 11-RC-6428 (December 29, 2000) (dosimetrists included in professional unit). Further, collective-bargaining agreements (CBAs) introduced into the record by the Petitioner indicate that dosimetrists and radiation therapists are included in technical units at Providence Regional Medical Center Everett (2006-2009 and 2009-2012 CBAs) (certified in Case 19-RC-13614) and Capitol Medical Center (2006-2009) (certified in Case 19-RC-13771).

thousands of parameters for each patient. Some treatment plans are completed in thirty minutes. Further, Honeywell testified that the algorithms within the computer perform "a lot of" the manipulations and the dosimetrist "can make little adjustments in the computer." Shepard testified that a standard algorithm "is used for the vast majority of cases." Acknowledging that some cases are more complicated, requiring several iterations of the treatment plan, and that there is judgment involved in manipulating the parameters, the record is unclear as to whether the position is "predominantly intellectual and varied in character." Nevertheless, even assuming that subpart (i) is satisfied, Section 2(12) requires that I "examine both the nature of the work performed *and* the background of the employees involved." *The Express-News Corp.*, 223 NLRB at 631 (emphasis added). Doing so, I am constrained to find that dosimetrists are not "professional employees" within the meaning of the Act due to their failure to meet the criteria set forth in subpart (iv) of Section 2(12)(a).

Subpart (iv) of Section 2(12)(a) provides that professional employees are engaged in work "requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes[.]" In arguing that dosimetrists meet this requirement, the Employer concedes that a bachelor's degree is not a requirement for that position, but notes that six of the eleven dosimetrists hold a bachelor's degree. The record further shows, however, that two of the six dosimetrists with bachelor's degrees did not receive their degree in medical dosimetry or, more broadly, a "physical science." Thus, seven of the eleven dosimetrists either do not hold any bachelor's degree or their degree is in a field unrelated to dosimetry. Although not dispositive, the fact that the dosimetrist group is predominantly composed of employees without a bachelor's of science degree supports the Petitioner's argument that dosimetrists are not professional employees under the Act.

Most of the Employer's dosimetrists entered the field as A.R.R.T.-registered radiation therapists. The Employer argues that A.R.R.T. registration, as well as CMD certification, renders dosimetrists professional employees. In support, the Employer notes that A.R.R.T. registration generally requires completion of a 2-year program, which itself requires prerequisite courses, resulting in three years of education. At that point, the individual must pass an examination. Further, in order to be certified as a CMD, a radiation therapist must have experience in the field and complete additional course work. I conclude that such a background is characteristic of technical employees, not "professional employees."

Technical employees perform work "of a technical nature involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools or through special courses."

Rhode Island Hospital, 313 NLRB at 353 (citations omitted). Further, "[t]echnical status is frequently evidenced by the fact that the employee is certified, licensed, or registered[.]" Id. The Board, in determining under its rule making procedures that a technical unit is a separate unit appropriate for collective bargaining purposes in the acute hospital industry, observed that such training and licensure distinguishes technical employees from other non-professional employees in the health care industry:

> Technical employees are found in major occupational groups including: medical laboratory, respiratory therapy, radiography, emergency medicine, and medical records…. [T]echnical employees perform jobs involving the use of independent judgment and specialized training, as opposed to service and maintenance employees who generally perform unskilled tasks and need only a high school education…. [T]echnical employees occupy a high-prestige status distinct from other categories of non-professional employees because of the training requirements for their jobs.
>
> Technical employees further are distinguished by the support role they play within the hospital, and by the fact that they work in patient care. Examples of their work include: routine clinical tests performed by medical laboratory technicians; general respiratory care administered by respiratory therapists; and x-rays, ultrasound procedures, and CAT scans performed by various technicians.
>
> [A]ll health care technical employees have significant additional education and/or training beyond high school, including: community college associate degree programs which provide math and science background beyond that which high schools offer; vocational training programs run by hospitals; programs at accredited schools of technology; and, in some fields, a full 4-year college degree.
>
> Further, the evidence indicates that most hospital technical employees are either certified (usually by passing a national examination), licensed, or required to register with the appropriate state authority, although laws regarding such licensure, registration, training and qualifications vary throughout the country.

284 NLRB 1516, 1553-1554 (1987) (citations omitted). The dosimetrists' background is consistent with this description of technical employees. See *Mad River Community Hospital*, 219 NLRB at 25 (laboratory technicians found to be technical employees where they "need a bachelor of science degree, which takes 4 years to acquire, and a 1-year internship, after which they must pass an examination"); *Trinity Memorial Hospital of Cudahy*, 219 NLRB 215, 217 (1975) (radiology department technologists found to be technical employees where they

were "required to complete a 2-year training program in radiology in an AMA-approved school which includes classroom as well as practical training").[23]

I note that the Employer primarily relies upon several cases for the proposition that the dosimetrists should be considered professionals regardless of whether they have obtained specific degrees. *St. Barnabas Hospital*, 283 NLRB 472 (1987); *Illinois Valley Community Hospital*, 261 NLRB 1048 (1982); *Group Health Assn.*, 317 NLRB 238 (1995); *Specialty Hospital of Washington-Hadley*, 2009 WL 2767339 (2009). These cases, however, are distinguishable and do not show that in the circumstances of this case, the dosimetrists should be considered professionals. In fact, to the contrary, most of them weigh directly in support of a finding that the dosimetrists here are technical employees rather than professional employees under Section 2(12)(a)(iv).

In *St. Barnabas Hospital*, the Board specifically analyzed the number of laboratory technologists holding degrees in making a determination that the absence of a requirement for a college degree did not preclude finding that the technologists were professionals. In *Barnabas*, however, 20 of the 26 technologists had college degrees and 7 of the 20 held graduate degrees. The Board found the circumstances of *Barnabas* to be consistent with the Board's decision in *Mason Clinic*, 221 NLRB 374 (1975), where 52 of 54 medical technologists had college degrees. The Board specifically distinguished *Middlesex General Hospital*, 239 NLRB 837, 838 fn. 10 (1978), where less than half of the technologists had degrees. Here, the circumstances are much more akin to *Middlesex*, where the employees were found to be technical employees, than to *Barnabas* and *Mason Clinic*, where between 76-96% of the employees possessed college degrees and were found to be professional employees.

In *Illinois Valley Community Hospital*, supra, the case involved medical technologists who were required to have obtained a bachelor's degree in medical technology or a related science and to have passed a qualifying examination given by the American Society of Clinical Pathologists (ASCP). Similarly, in *Group Health Assn.*, supra, the Employer required a BS degree and ASCP certification. Thus, neither case is comparable to the circumstances here, where dosimetrists are not currently required to obtain a bachelor's degree. In fact, only 4 of the 11 dosimetrists have a bachelor's degree in a physical science.

In *Specialty Hospital of Washington-Hadley*, 2009 WL 2767339 (2009), an ALJ primarily addressed whether the Employer had a bargaining obligation with the Union in the context of an unfair labor practice. Although the Judge noted that there was a split of cases finding respiratory therapists to be either technical or professional, the Judge specifically stated that he "need not decide the status of these employees as to whether they are technical or professional" in reaching

[23] I note that several classifications currently included in the Employer's technical unit – CT Technologist, Mammography Technologist, MRI Technologist, Nuclear Medicine Technologist, PET CT Technologist – are also certified by A.R.R.T.

his decision. As a result, *Specialty Hospital* does not support a finding that professional status is warranted here.

Thus, while a bachelor's degree in the specialized field is not specifically required for professional status, I am unaware of any cases, and none have been presented, where the Board has analyzed and found employees to be professional where such a low percentage of the employees were hired with degrees in their related field. Further, although the alternate routes of obtaining the necessary education and training for the position are demanding, they do not meet the stringent requirements set forth in Section 2(12)(a). Accordingly, I find that dosimetrists' education and training render them technical employees, not professional employees within the meaning of Section 2(12).

C. Radiation Therapists' Status as Professional or Technical Employees

The Employer currently employs 36 radiation therapists. The Employer contends that radiation therapists are "professional employees" under the Act and, therefore, cannot be included in the technical unit. The Petitioner maintains that radiation therapists are technical employees. For the reasons stated below, I find that the radiation therapists employed by the Employer are "technical employees," not professionals under Section 2(12) of the Act.

Radiation therapists, like dosimetrists, are important members of the radiation oncology team. The record shows that carrying out the treatment plan involves the consistent exercise of discretion and judgment, satisfying subpart (ii) of Section 2(12)(a). It is not clear, however, that such work is "predominantly intellectual and varied in character" and that the result "cannot be standardized," as required by subparts (i) and (iii). The treatment plans themselves are prepared by dosimetrists who, after receiving approval from the physician, electronically transmit the plan to the linear accelerator. Each two or three-member team of radiation therapists performs 15-45 treatments a day, with each treatment typically lasting 10-20 minutes. The volume and efficiency of work suggests that the work is not varied in character and can be standardized. In its post-hearing brief, the Employer argues that "[p]erhaps the most important function of the radiation therapist is to identify if there are any concerns or problems that would prevent treatment." Given that the physician typically sees the patient only once a week, the radiation therapists' daily assessment of the patient is important. But this function does not render the position "predominantly intellectual and varied in character" or belie the notion that the work can be standardized. See *Samaritan Health Services, Inc.*, 238 NLRB 629, 637 (1978) (radiologic technologists, required to have 2 years of college, a clinical internship, and registration by A.R.R.T., excluded from professional unit where, inter alia, work not predominantly intellectual); *Trinity Memorial Hospital of Cudahy*, 219 NLRB 215, 217 (1975) (radiology department technologists, required to complete 2-year training program in radiology, found to be technical employees where they

were required to exercise independent judgment in the selection of various types of x-rays, the position of the patient, and the number of pictures for each patient); *Barnert Memorial Hospital Center*, supra (x-ray technicians); *Clarion Osteopathic Hospital*, 219 NLRB 248, 249 (1975) (x-ray technicians).

Lewis, the supervisor of the radiation therapists, described the assessment of a patients' condition as a "layman's assessment," not a nursing assessment. Lewis characterized a nursing assessment as more extensive than "just having a conversation with the patient like the therapist does." Vance Ewald, a lead radiation therapist, similarly described this assessment as a brief conversation. Just before treatment begins, the radiation therapist has a brief discussion with the patient; if the patient reports a problem, or a problem is apparent, the radiation therapist consults a nurse or the physician. This usually does not happen, but on those occasions that it does the radiation therapist is essentially performing a reporting function.

Moreover, even assuming that subparts (i), (ii) and (iii) are satisfied, the radiation therapists do not meet the requirements of Section 2(12)(a)(iv). The typical educational path is a 24-month radiation therapy program (e.g., Bellevue College) resulting in an Associate of Arts (A.A.) degree, as well as A.R.R.T. registration and licensing through the State of Washington. The evidence is clear that a very small percentage of radiation therapists possess bachelor's degrees. In fact, only 9 out of 36 (25%) have bachelor's degrees; of those, only seven have bachelor's of science degrees. Further, the training and qualifications required to become a radiation therapist are similar to those required for other technical employees. Thus, the failure of the radiation therapists to meet the requirements of Section 2(12)(a)(iv) is even more dramatic than the dosimetrists, as discussed in detail in the dosimetrist analysis above in Section III.B.. Further, although obtaining an A.A. degree and A.R.R.T. registration is demanding, they do not meet the stringent requirements set forth in Section 2(12)(a). Accordingly, I find that radiation therapists' education and training render them technical employees, not professional employees within the meaning of Section 2(12). The cases cited by the Employer do not support the argument that radiation therapists meet the educational prong of the professional employee definition. To the contrary, they support a finding of technical status. See *St. Barnabas Hospital*, 283 NLRB 472 (1987); *Illinois Valley Community Hospital*, 261 NLRB 1048 (1982); *Group Health Assn., Inc.*, 317 NLRB 238 (1995). As a result, I find that the radiation therapists are technical employees.

IV. CONCLUSION

Based on the foregoing, the entire record, and having carefully considered the parties' briefs, I conclude that the Employer's dosimetrists and radiation therapists are technical employees, not professional employees within the meaning of Section 2(12) of the Act.

Accordingly, I shall direct an election in the following appropriate voting group:

> All full-time and regular part-time dosimetrists and radiation therapists employed by Swedish Medical Center ("the Employer") at the Employer's facilities in Burien, Edmonds, Renton, and Seattle, Washington, excluding all other employees, guards and supervisors as defined in the Act.

There are approximately forty-seven (47) employees in the voting group found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by SEIU Healthcare 1199NW. If a majority of the valid ballots in the election are cast for the Petitioner, the employees will be taken to have indicated their desire to be included in the existing recognized Unit currently represented by the Petitioner (as set forth above on pages 11-12) , and it may bargain for those employees as part of that Unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated their desire to remain unrepresented.

A. List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may

be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before **November 6, 2009**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of four copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **5 p.m ET on November 13, 2009**. The request may be filed through E-Gov on the Board's web site, www.nlrb.gov, but may not be filed by facsimile.[24]

[24] To file a request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the

DATED at Seattle, Washington, this 30th day of October, 2009.

_____
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

"Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.